So if the father entrusted the car to a very young or incompetent son, he might well be held on account of his own negligence — much as if he had given such a youth a gun.[14] But on the assumption that the son was *compos mentis* (except as afterwards shown by the "joy-ride") the father should not be liable. A recent New York case has so held, following previous authority in that state.[15] *Heissenbuttel* v. *Meagher*, 162 N. Y. App. Div. 752. This is in accord with the majority of the decided cases.[16]

But it may be urged, on the other hand, that, as automobiles have latent possibilities of causing great damage, and yet are treated almost disrespectfully by the youngest children, as a matter of justice the owner should be absolutely liable for injuries inflicted. Such a rule might have a salutary effect, but its creation is within the province of the legislatures, not of the courts, and should not be arrived at by distorting the principles of agency and torts to fit the case.[17] Let not the ancient maxim be transformed to read, *Qui facit per auto facit per se*.[18]

STATE POWER TO TAX THE PROCEEDS OF INTERSTATE COMMERCE. — By what method and to what extent a state may tax the receipts from interstate commerce without its constituting an interference with federal regulation is a question which has been frequently presented to the United States Supreme Court. This judicial consideration, however, has formerly served to obscure rather than to facilitate the solution of the problem, as upon several occasions the court has altered its position, not infrequently with its members nearly evenly divided; while each of its views, for a time at least, has found followers. At first a tax was permitted "upon the gross receipts" of transportation companies even in addition to other property assessments.[1] But the court refused to follow this case,[2] and its result was soon repudiated.[3] A levy

[14] Meers *v.* McDowell, 110 Ky. 926, 62 S. W. 1013; Johnson *v.* Glidden, 11 S. D. 237, 76 N. W. 933.

[15] Maher *v.* Benedict, 123 N. Y. App. Div. 579. See also Roberts *v.* Schanz, 144 N. Y. Supp. 824.

[16] Maher *v.* Benedict, *supra*; Parker *v.* Wilson, *supra*; Reynolds *v.* Buck, 127 Ia. 601, 103 N. W. 946; Doran *v.* Thomsen, *supra*; Linville *v.* Nissen, 77 S. E. 1096 (N.C.); 25 HARV. L. REV. 734. Tanzer *v.* Read, 160 N. Y. App. Div. 584, was a case where the wife of the owner was driving. The court said she was in no sense acting as an agent.

[17] See remarks of Clarke, J., in Cunningham *v.* Castle, *supra*.

[18] Although to a Greek scholar such a maxim may appear sound, it is philologically incorrect, and should not be translated into English.

[1] State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, Justices Miller, Field, and Hunt dissenting. The court, reasoning on the analogy of Brown *v.* Maryland, 12 Wheat. (U. S.) 419, declared this to be no less valid than a tax on goods imported into the state and mingled with the general mass of property. The case was followed in Western Union Telegraph Co. *v.* Mayer, 28 Oh. St. 521, and Western Union Telegraph Co. *v.* Commonwealth, 110 Pa. 405, 20 Atl. 720.

[2] Fargo *v.* Michigan, 121 U. S. 230.

[3] Philadelphia and Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326. The answer to the suggested analogy of Brown *v.* Maryland, *supra*, is pointed out by Bradley, J., 122 U. S. 326, 341: imported goods "are not followed and singled out for taxation as imported goods, and by reason of their being imported." The same principle is to be found in Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411.

upon the actual receipts themselves was classified the same as any direct regulation of interstate transportation.[4] This apparently settled the question, but later a statute was sustained which imposed upon railroads companies in lieu of other property taxes, except local assessments on land and fixtures, "an annual franchise tax" based on gross receipts and the ratio which the amount of mileage within the state bore to the road's total mileage.[5] This decision has been subjected to much adverse criticism,[6] and cannot be sustained on the ground upon which it was put: as a grant of a license to do business; for a state cannot charge for the privilege of engaging in interstate commerce.[7] It was saved by a later case, however, as being merely a device for ascertaining the actual value of railroad property within the state.[8] Thus the prevailing view is that a tax on the receipts *quâ* receipts is unconstitutional,[9] but a tax on the intrastate property calculated by reference to the receipts is valid. Albeit the distinction is somewhat narrow, the temptation to interfere with interstate commerce is not present in the same degree as it would be if direct assessments upon gross receipts were permitted.[10]

But if a tax is to be upheld as a property tax, it is not legislative designation which makes it so. Its name is only of consequence as being a clue to legislative intent. By taking other facts into consideration the court must find that it actually is a tax upon property.[11] Thus, for example, if the tax levied be unduly great with reference to the real value of the company's property within the state, it cannot be sustained.[12] It is likewise important to observe what other taxes are imposed. If the assessment on gross receipts be in lieu of direct taxes on property, that fact is almost decisive in favor of its constitutionality.[13]

[4] Case of State Freight Tax, 15 Wall. (U. S.) 232. In Philadelphia and Southern Steamship Co. *v.* Pennsylvania, *supra*, 122 U. S. 326, 340, Bradley, J., says, "A tax upon fares and freights received for transportation is virtually a tax upon the transportation itself."

[5] Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217. Justices Bradley, Harlan, Lamar and Brown dissenting.

[6] See COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, § 73 a; WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, § 338; article by Professor Beale, 17 HARV. L. REV. 248, 262.

[7] Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Leloup *v.* Mobile, 127 U. S. 640; McCall *v.* California, 136 U. S. 104; Crutcher *v.* Kentucky, 141 U. S. 47; BEALE, FOREIGN CORPORATIONS, § 751.

[8] Galveston, H. & S. Ry. Co. *v.* Texas, 210 U. S. 217, Justices Harlan, Fuller, White, and McKenna dissenting. This case has been followed by Oklahoma *v.* Wells, Fargo & Co., 223 U. S. 298; United States Express Co. *v.* Minnesota, 223 U. S. 335.

[9] It should be observed that nothing turns on phraseology in this connection. In Galveston, H. & S. Ry. Co. *v.* Texas, *supra*, 210 U. S. 217, 227, Holmes, J., says, "The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let interstate traffic and the receipts from it alone."

[10] In Galveston, H. & S. Ry. Co. *v.* Texas, *supra*, 210 U. S. 217, 227, Holmes, J., says, "When a legislature is trying simply to value property, it is less likely to attempt or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce."

[11] See Holmes, J., in Galveston, H. & S. Ry. Co. *v.* Texas, *supra*, 210 U. S. 217, 227.

[12] Fargo *v.* Hart, 193 U. S. 490.

[13] See United States Express Co. *v.* Minnesota, *supra*.

But if, on the other hand, there be a gross revenue tax which is to be in addition to taxes levied and collected upon an *ad valorem* basis upon property and assets, this would seem an almost conclusive factor the other way.[14]

The true distinctions in the matter appear to have been overlooked by a holding not long ago in a lower Texas court in favor of the validity of a statute imposing upon terminal companies an "occupation tax" equal to one per cent of their gross receipts. *State* v. *Houston Belt & Terminal Ry. Co.*, 166 S. W. 83 (Tex. Civ. App.).[15] The court, quoting from the repudiated reasoning of one of the earlier United States Supreme Court cases,[16] relies chiefly upon the word "occupation" to make the enactment constitutional. But this would seem to lead to the opposite conclusion; for if the statute really provides for what it declares it does, namely, an assessment upon the privilege of conducting the occupation of a terminal company, it would be clearly invalid.[17] Nevertheless, if in spite of its name the statute provides for what is in reality a property tax, the statutory title may be disregarded and the substance of the statute investigated.[17] By its terms nearly all the old taxes are to continue, except one upon intangible [18] assets.[19] It does not appear what the intangible assets of the contesting terminal company are worth, but if the amount of the tax when compared with the value of those assets is not excessive,[12] then the assessment here may constitutionally be defended as a property tax.[20] Nor can there be any question as to apportionment of the valuation of the intangible assets according to the Texas mileage,[21] as the mileage of this terminal company is all within the state.

Accordingly, should the occasion arise to review this decision, the United States Supreme Court, although it conceivably might uphold the tax, would seemingly have difficulty in reconciling the reasoning of the court with the prevailing principles governing the utilization of the proceeds of interstate commerce as a basis for taxation.

DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE OFFICIALS. — Recent decisions afford frequent illustration of changes in the law to meet altered social, economic, and political conditions. The United States Supreme Court has lately held that a married woman may acquire a domicile apart from her husband for the purpose of

[14] See Oklahoma *v.* Wells, Fargo & Co., *supra*.

[15] This case is more completely stated in this issue of the REVIEW, p. 115.

[16] Maine *v.* Grand Trunk Ry. Co., *supra*.

[17] Postal Telegraph Co. *v.* Adams, 155 U. S. 688.

[18] Intangible assets comprise the property value of the franchise, commercial securities, choses in action, good-will, the value of the business as a going concern, etc. See article by Professor Beale, 17 HARV. L. REV. 248.

[19] The tax upon intangible assets was imposed by ACT 29TH LEG., C. 146. A former "occupation" tax, imposed by ACT 29TH LEG., C. 148, was repealed by the statutory enactment in question.

[20] In Maine *v.* Grand Trunk Ry. Co., *supra*, the intangible assets were all that were left untaxed, and yet the statute was upheld.

[21] This was the method employed in Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, and in Maine *v.* Grand Trunk Ry. Co., *supra*.